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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATHANIEL ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 539 F. 2d 898.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1976. A petition for rehearing and rehearing *en banc* (Pet. App. 16a) was denied on September 3, 1976. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 18, 1976, and the petition was filed on October 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly denied petitioner's motion to suppress recordings of intercepted telephone conversations between his co-defendant and a government informant.

2. Whether the seizure of evidence from petitioner's residence was authorized by a valid search warrant.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846, and of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to eight years' imprisonment and five years' special parole. The court of appeals affirmed (Pet. App. 1a-14a).

On December 7, 1973, John Mondaine, an informant for the Drug Enforcement Agency (DEA) in Kansas City, Missouri, telephoned co-defendant Edward Hodge[2] in Detroit to say that he wanted to buy a pound of heroin (Tr. I. 32, 35).[3] The two men discussed the quantity, quality, and price of the drug (Tr. I. 35-36) and tentatively agreed that Mondaine would go to Detroit to effect the transaction (Pet.

[1]Petitioner asserts (Pet. 6) that he was found guilty of the possession count alone and points in support of this proposition to a statement by the jury foreman (Pet. App. 17a) indicating that the jury returned a guilty verdict as to only one count. Petitioner omits reference to the page of the transcript (Tr. II. 861) that follows the page he reproduces and that shows that the jury convicted on both counts. Moreover, as the court of appeals indicated (Pet. App. 1a), the judgment states that petitioner was convicted on both counts. The transcript of the proceedings at sentencing also shows that petitioner was convicted on both counts (Tr. II. 864) and that he did not take exception to the court's statement at sentencing that he had been so convicted.

[2]Hodge's conviction was reversed on the ground that the trial judge erred in refusing to submit his defense of entrapment to the jury (Pet. App. 12a-14a).

[3]"Tr. I." refers to the first volume of trial transcript, which includes testimony taken on September 20, 1974, and is paginated separately from "Tr. II.," which covers the pretrial hearing on defendants' motion to suppress the recordings of the intercepted communications, and the remainder of the trial.

App. 2a). The conversation was recorded with Mondaine's consent by DEA Agent Ryan (Tr. I. 37; Tr. II. 188-190), and a recording of it was introduced into evidence and played for the jury at trial (Tr. II. 193, 209, 214).

On December 12, 1973, Mondaine telephoned Hodge again. The two men agreed to consummate the transaction on December 14 (Pet. App. 2a-3a). This conversation was also recorded (Tr. II. 190) and admitted in evidence at trial (Tr. I. 193, 215).

On December 13, Hodge met Mondaine at Detroit Metropolitan Airport. Mondaine displayed $19,200, which he left in an airport locker (Tr. I. 40, 44; Tr. II. 217, 220). After driving about and making numerous stops, the two men drove to Stafford's Restaurant in Detroit, arriving at about 10:40 p.m. (Tr. I. 45, 47-48, 95-96; Tr. II. 257, 363).

Hodge told Mondaine that he would have to leave to obtain a sample of the heroin (Tr. I. 96-97). He then drove directly from the restaurant to petitioner's residence—all the time under surveillance by DEA agents. He stayed at petitioner's home only momentarily, and then drove directly back to the restaurant (Tr. II. 257-260, 364-365). Upon his return he handed Mondaine a small package, which he said contained heroin (Tr. I. 98-100).

Early the next morning Hodge gave Mondaine a ball-shaped package of heroin (Tr. I. 102-103). Mondaine insisted that the heroin be measured. Hodge drove him to an unknown location, where he was introduced to petitioner (Tr. I. 104-105), who measured the heroin, found it to be "short," and reduced the price accordingly (Tr. I. 107). Hodge and Mondaine then drove to the airport, where DEA agents arrested Hodge and seized the heroin (Tr. I. 109; Tr. II. 221-223, 317, 367, 442).

Following Hodge's arrest the agents, acting pursuant to a warrant,[4] searched petitioner's house and seized three plastic bags containing water residue and traces of heroin, a photograph depicting petitioner and Hodge, several checks, and a quantity of currency (Tr. II. 267-268, 322-327, 333-335, 443-444).

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the recordings of the telephone conversations between Mondaine and co-defendant Hodge should have been suppressed because Michigan law forbids the use in evidence of conversations intercepted without a warrant or the consent of both parties. As the court of appeals correctly held, however (Pet. App. 9a-10a), since petitioner was neither a party to the intercepted communications nor a target of the interceptions, he lacks standing to challenge the admissibility of the recordings. See *Alderman* v. *United States*, 394 U.S. 165, 175-176; *United States* v. *Armocida*, 515 F. 2d 29, 35 n. 1 (C.A. 3), certiorari denied *sub nom. Joseph* v. *United States*, 423 U.S. 858.

In any event, petitioner's reliance on Michigan law is unavailing, since federal rather than state law determines the admissibility of evidence in the federal courts. See *Ker* v. *California*, 374 U.S. 23, 31-33; *Elkins* v. *United States*, 364 U.S. 206, 224. Mondaine's consent to the recording of his conversations with Hodge made the recording lawful under 18 U.S.C. 2511(2)(c),[5] and the recordings were therefore properly admitted regardless of inconsistent state law. See *United States* v. *Magda*, C.A. 2, No. 76-238, decided

[4]The underlying affidavit is reproduced at Pet. 16-19, and at Pet. App. 4a-6a, n. 6.

[5]And under the Constitution as well, see *United States* v. *Bonanno*, 487 F. 2d 654, 657-658 (C.A. 2); see also *United States* v. *White*, 401 U.S. 745, 751.

December 22, 1976, slip op. 1039-1040 n. 2; *United States* v. *Armocida, supra*, 515 F. 2d at 51-52; *United States* v. *Keen*, 508 F. 2d 986, 988-989 (C.A. 9), certiorari denied, 421 U.S. 929; *United States* v. *Melancon*, 462 F. 2d 82, 91-92 (C.A. 5), certiorari denied, 409 U.S. 1038; *United States* v. *Sims*, 450 F. 2d 261, 262-263 (C.A. 4).

2. Petitioner also asserts (Pet. 16-35) that the warrant-authorized search and seizure conducted at his residence was unlawful.

a. Contrary to petitioner's contention, the affidavit submitted in support of the warrant, when tested in a commonsense fashion (*United States* v. *Ventresca*, 380 U.S. 102, 108), furnished probable cause to believe that petitioner's house was the source of the sample of heroin that Hodge had obtained for Mondaine and that it contained additional quantities of the drug. As the court of appeals correctly noted (Pet. App. 8a), the magistrate reasonably could have found, on the basis of the information contained in the affidavit, that:

> 1) a confidential informant (Mondaine) of proven reliability had advised the DEA that Hodge dealt in substantial quantities of heroin; 2) it was Hodge's procedure to inspect the purchaser's money and then go to his source to obtain the drugs; 3) at a restaurant, Hodge informed Mondaine that he was going to get a sample of heroin; 4) a DEA agent followed Hodge to the address on the warrant and then back to the restaurant; 5) Hodge gave the sample to Mondaine indicating that he had gone directly to his source to obtain it and that it was of the quality of heroin Hodge would deliver; and 6) Hodge told Mondaine that he had one pound of

heroin available for immediate delivery and could sell him additional quantities on short notice.[6]

b. Petitioner also claims (Pet. 20-25) that the affidavit was inadequate because it contained double hearsay, in the form of Hodge's statement to Mondaine that he was going to obtain the heroin from his source. Multiple hearsay does not, however, invalidate an otherwise valid search warrant. Rather, an affidavit containing double hearsay will be deemed sufficient whenever it presents facts showing the reliability of the declarant and the accuracy of his information. See, *e.g.*, *United States* v. *DiNovo*, 523 F. 2d 197 (C.A. 7), certiorari denied, 423 U.S. 1016; *United States* v. *McCoy*, 478 F. 2d 176 (C.A. 10), certiorari denied, 414 U.S. 828; *United States* v. *Smith*, 462 F. 2d 456 (C.A. 8).

The instant affidavit meets that test. It established Hodge's credentials as a knowledgable heroin dealer through Mondaine's descriptions of their previous dealings and through the seizure of a large quantity of heroin from Hodge's automobile. Moreover, Hodge's references to obtaining the heroin sample from his source were sufficiently adverse to his penal interest to justify an inference of reliability (see *United States* v. *Harris*, 403 U.S. 573, 579). Finally, the surveillance of his trip from the restaurant to petitioner's residence, and his delivery of a sample of the heroin to Mondaine immediately thereafter, lent added verification to his statements mentioned in the

[6]Petitioner's argument (Pet. 20) that the affidavit was insufficient because it contained no express averment that Hodge's statements about obtaining the heroin from his source were made at the exact moment he left the restaurant amounts to "the very sort of hypertechnicality * * * condemned by this Court in *Ventresca*" (*United States* v. *Harris*, 403 U.S. 573, 579). A realistic reading of the affidavit reveals that paragraphs 6 through 18 (Pet. 17-19) present a sequential narrative that provides a reasonable basis to conclude, as did both courts below, that Hodge had procured the sample from petitioner's residence (Pet. App. 4a-6a, n. 6).

affidavit. See *United States* v. *Gavic*, 520 F. 2d 1346, 1350-1351 (C.A. 8); *United States* v. *Carmichael*, 489 F. 2d 983, 986-987 (C.A. 7); *United States* v. *Alonzo*, 447 F. 2d 126 (C.A. 2).

c. As the court of appeals correctly concluded (Pet. App. 8a-9a), there is no substance to petitioner's contention that the affidavit was "tailored" to omit a material fact that would, if known, have negated probable cause. It is true that the affidavit did not include a detailed itinerary of Hodge's stops in the Detroit area on December 13, 1973, prior to his and Mondaine's arrival at the restaurant. But nothing in the record indicates that this omission was intended in any way to deceive the magistrate; rather, it would seem most reasonable to assume that these facts were omitted because of their irrelevancy to the issue of probable cause to believe that petitioner's house contained drugs. In any event, given Hodge's statements about obtaining the sample, and the observation of his movements between the restaurant and petitioner's house, there was probable cause to believe that a quantity of heroin would be found at the latter address even if Hodge's irrelevant travels earlier in the evening had been considered.[7]

d. Finally, petitioner asserts (Pet. 32-35) that the agents executing the search warrant exceeded its mandate in seizing a photograph (of Hodge and petitioner) and three checks drawn by petitioner and endorsed either by Hodge, Hodge's girlfriend, or Hodge's business. Contrary to petitioner's assertion, however, these articles were within the scope of the warrant, which authorized seizure of "any and all property * * * which constitute[s] evidence of heroin or other narcotics or controlled substance

[7]The cases cited by petitioner (Pet. 26, 28) involve affirmative misstatements of fact and are accordingly inapposite.

* * * which are being used in violation of Title 21, United States Code, Sections 841(a)(1), 844, 846" (Pet. 33). The checks and the photograph tended to establish petitioner's association and involvement with Hodge and were therefore probative of the existence of the conspiracy. See *United States* v. *Nathan,* 476 F. 2d 456, 460 (C.A. 2), certiorari denied, 414 U.S. 823; *United States* v. *Armone,* 363 F. 2d 385, 403-404 (C.A. 2), certiorari denied, 385 U.S. 957. Accordingly, these items were sufficiently designated in the warrant to justify their seizure by the agents.

In any case, the seized items came into the agents' view while the agents were executing a valid warrant, and "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States, supra,* 390 U.S. 236. The DEA agents executing the warrant had probable cause to "believe that the evidence [seized would] aid in a particular apprehension or conviction" (*Warden* v. *Hayden,* 387 U.S. 294, 307), and the seizure was accordingly lawful. See *United States* v. *Kane,* 450 F. 2d 77, 85 (C.A. 5), certiorari denied, 405 U.S. 934, and *sub nom. Sklaroff* v. *United States,* 405 U.S. 920; see also *Andresen* v. *Maryland,* No. 74-1646, decided June 29, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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